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ENDORSED
FILED
ALAMEDA COUNTY

DEC 18 2015
CLERK OF THE SUPERIOR COURT
By _____ Deputy

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9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ERIKA MCCARTNEY, in the public interest,)
12 Plaintiff,)
13 v.)
14 CM INTERNATIONAL, INC., a Colorado)
15 corporation; and DOES 1 through 500, inclusive,)
16 Defendants.)

CIVIL ACTION NO. **RG 14751871**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

[Cal. Health and Safety Code
Sec. 25249.6, *et seq.*]

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COMPLAINT FOR INJUNCTIVE RELEIF AND CIVIL PENALTIES
McCartney v. CM International, Inc.

FILED

1 Plaintiff Erika McCartney, in the public interest, based on information and belief and
2 investigation of counsel, except for information based on knowledge, hereby makes the following
3 allegations.

4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendant's continuing failure to warn individuals
6 in California that they are being exposed to wood dust (hereinafter "Wood Dust"), a substance
7 known to the State of California to cause cancer through. Such exposures have occurred, and
8 continue to occur through the manufacture, distribution, sale and use of Defendant's "Camerons
9 Products Mesquite Smoking Chips" (the "Product").
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11 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
12 unlawful for businesses to knowingly and intentionally expose individuals in California to
13 substances known to the State to cause cancer, birth defects or other reproductive harm without
14 providing clear and reasonable warnings to individuals prior to exposure. Defendant introduces
15 products contaminated with significant quantities of Wood Dust into the California marketplace,
16 exposing consumers to Wood Dust.
17

18 3. Despite the fact that the Defendant exposes consumers to Wood Dust, Defendant
19 has, during the operative period, provided no warnings about the carcinogenic hazards associated
20 with Wood Dust exposure. Defendant's conduct thus violates the warning provision of Proposition
21 65, Health & Safety Code § 25249.6.
22

23 PARTIES

24 4. Plaintiff brings this enforcement action in the public interest pursuant to Health &
25 Safety Code § 25249.7(d).
26

1 11. To effectuate this goal, Proposition 65 prohibits exposing people to substances listed
2 by the State of California as known to cause cancer, birth defects or other reproductive harm
3 without a “clear and reasonable warning” unless the business responsible for the exposure can
4 prove that it fits within a statutory exemption. Health & Safety Code § 25249.6 states, in pertinent
5 part:

6 No person in the course of doing business shall knowingly and intentionally
7 expose any individual to a chemical known to the state to cause cancer or
8 reproductive toxicity without first giving clear and reasonable warning to such
9 individual

10 12. On December 18, 2009, the State of California officially listed Wood Dust as a
11 substance known to cause cancer. On December 18, 2010, one year after it was listed as a
12 substance known to cause cancer, Wood Dust became subject to the clear and reasonable warning
13 requirement regarding carcinogens under Proposition 65. 27 C.C.R. 27001(c); Health & Safety
14 Code § 25249.10(b).

15 13. Defendant’s Product contains sufficient quantities of Wood Dust such that
16 consumers using the Product are exposed to Wood Dust. The primary route of exposure for the
17 violations is through inhalation. These exposures occur everywhere throughout California where
18 the Product is used.

19 14. No clear and reasonable warning is provided with the Product regarding the
20 carcinogenic hazards of Wood Dust.

21 15. Any person acting in the public interest has standing to enforce violations of
22 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
23 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
24 within such time. Health & Safety Code § 25249.7(d).
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1 16. More than sixty days prior to naming the Defendant herein, Plaintiff provided a 60-
2 Day "Notice of Violation of Proposition 65" to the California Attorney General, the District
3 Attorneys of every county in California, the City Attorneys of every California city with a
4 population greater than 750,000 and to each of the named Defendants. In compliance with Health
5 & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following
6 information: (1) the name and address of each violator; (2) the statute violated; (3) the time period
7 during which violations occurred; (4) specific descriptions of the violations, including (a) the routes
8 of exposure to Wood Dust from the Products, and (b) the specific type of Products sold and used in
9 violation of Proposition 65; and (5) the name of the specific Proposition 65-listed substance that is
10 the subject of the violations described in each Notice.
11

12 17. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
13 General, the District Attorneys of every county in California, the City Attorneys of every California
14 city with a population greater than 750,000 and to each of the named Defendants. In compliance
15 with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that
16 Plaintiff's counsel: (1) has consulted with one or more persons with relevant and appropriate
17 experience or expertise who reviewed facts, studies or other data regarding the exposures to Wood
18 Dust alleged in each Notice; and (2) based on the information obtained through such consultations,
19 believes that there is a reasonable and meritorious case for a citizen enforcement action based on
20 the facts alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11
21 C.C.R. § 3102, each Certificate served on the Attorney General included factual information -
22 provided on a confidential basis – sufficient to establish the basis for the Certificate, including the
23 identity of the person(s) consulted by the Plaintiff's counsel and the facts, studies or other data
24 reviewed by such persons.
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1 18. None of the public prosecutors with the authority to prosecute violations of
2 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
3 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
4 Plaintiff's Notices.

5 19. Defendant both knows and intends that individuals will use the Product, thus
6 exposing them to Wood Dust.

7 20. Under Proposition 65, an exposure is "knowing" where the party responsible for
8 such exposure has:

9
10 knowledge of the fact that a[n] ... exposure to a chemical listed pursuant
11 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that
the ... exposure is unlawful is required.

12 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
13 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
14 12201).

15 21. Defendant has been informed of the Wood Dust in its Products by the 60-Day
16 Notice of Violation and accompanying Certificate of Merit served on it.

17 22. Defendant further has, throughout the operative period, had knowledge its Product
18 contains Wood Dust.

19 23. As a company that manufactures, imports, distributes and/or sell the Products for use
20 in the California marketplace, Defendant knows or should know that the Product contains Wood
21 Dust and that individuals who uses the Product will be exposed to Wood Dust. The exposures to
22 consumers who use the Products are a natural and foreseeable consequence of Defendant's placing
23 the Products into the stream of commerce.
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1 Dust without first giving clear and reasonable warnings to such individuals regarding the
2 carcinogenic effects of Wood Dust.

3 **PRAYER FOR RELIEF**

4 Wherefore, Plaintiff prays for judgment against Defendants as follows:

5 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil
6 penalties against each of the Defendant in an amount up to \$2,500 per day for each violation of
7 Proposition 65;

8 2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and
9 permanently enjoin Defendant from offering the Product for sale in California without either
10 reformulating the Product such that no Proposition 65 warnings is required or providing prior clear
11 and reasonable warnings, as Plaintiff shall specify in further application to the Court;


12 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendant to
13 take action to stop ongoing unwarranted exposures to Wood Dust resulting from use of the Product
14 sold by Defendant, as Plaintiff shall specify in further application to the Court;

15 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable
16 statute, theory, rule or doctrine, grant Plaintiff its reasonable attorneys' fees and costs of suit; and

17 5. That the Court grant such other and further relief as may be just and proper.

18 Dated: December 16, 2014

PACIFIC JUSTICE CENTER

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23 By: 
24 Robert B. Hancock
25 Attorneys for Plaintiff
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